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STATEMENT OF JURISDICTION

Jurisdiction over this attorney discipline matter is established by Article V, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040, R.S.Mo. (1994).

STATEMENT OF FACTS

1. Background and Disciplinary History

Respondent Josh P. Tolin is a forty-nine year old attorney who was licensed to practice law in the State of Missouri on April 25, 1986. **App. 23 (T. 81); App. 55, 64.**¹

Respondent has received prior discipline from this Court. By order dated June 14, 2002, in Case No. SC84533, the Supreme Court suspended Respondent's license to practice law for a period of 150 days, retroactive to April 13, 2002. In addition, the Court approved the provisions of the parties' Stipulation that provided for the appointment of a monitor to review Respondent's law firm trust account activity for a period of five (5) years. **App. 55, 64.** Ninety days of the 150 day suspension were for disciplinary reasons as a result of violating Rules 4-1.15 and Rule 4-8.4(d) of the Rules of Professional Conduct. The other sixty days of the 150 day suspension was for medical reasons. **App. 21, 23 (Tr. 74-75; 84).**

After that suspension period ended, the complaint in this case was received by the Office of Chief Disciplinary Counsel on May 13, 2003 and referred to the Region XI

¹ The facts contained herein are drawn from the testimony elicited and the exhibits admitted into evidence at the trial in this matter conducted on June 20, 2005. Citations to the trial testimony on June 20, 2005 are denoted by the appropriate Appendix page reference followed by the specific transcript page reference in parentheses, for example "**App. ____ (Tr. ____)**". Citations to the trial exhibits are denoted by the appropriate Appendix page reference.

Disciplinary Committee for investigation on May 16, 2003. The Region XI Disciplinary Committee investigated the matter, found probable cause and voted to issue an Information against Respondent on March 26, 2004. **App. 69-70.** Informant served the Information in this case on Respondent on June 25, 2004. Respondent filed his Answer to the Information on or about July 9, 2004. The Chair of the Missouri Advisory Committee appointed a Disciplinary Hearing Panel in this case on July 16, 2004. After a member of the panel recused himself, the Chair of the Advisory Committee appointed a new Panel member and a replacement presiding officer for the Disciplinary Hearing Panel on March 7, 2005. The Panel held its hearing in this matter on June 20, 2005. The Panel issued its Findings of Fact, Conclusions of Law and Recommendation on October 29, 2005. **App. 44-54.**

II. Relevant Facts Surrounding the Brenda Dietrich Complaint

Respondent's personal relationship with a third party, Amy Lennen ("Lennen"), is at the core of both the case at bar and the prior case before this Court that led to the June 14, 2002 suspension order. **App. 56, 64.** Respondent met Lennen at a Las Vegas "club" in 1999. **App. 33 (Tr. 122).** Lennen had been employed by the "Crazy Horse II" club for ten years. **App. 102.** Although Respondent was married with two children at the time, he became deeply infatuated and intimately involved with Lennen and lavished her with gifts and cash. **App. 33 (Tr. 121-122).**

Brenda (maiden name: Harrison) Dietrich retained Respondent to represent her in a wrongful death/medical negligence action against Hannibal Regional Hospital and Dr. Richard Valuk arising out of the death of Dietrich's mother. **App. 5-6 (Tr. 12-14).**

Dietrich provided Respondent with personal documents in order to assist Respondent in handling the case, including copies of her birth certificate and driver's license. **App. 6, 26 (Tr. 13-14, 93-94).**

During attorney-client meetings between Respondent and Dietrich, Respondent would frequently discuss his personal life, including Lennen. These meetings were often interrupted by cell phone calls from Lennen to Respondent. Respondent explained to Dietrich that "Amy" was his "half sister" who had a drug and legal problems and that he was helping by sending her money. **App. 6 (Tr. 14-15).**

Lennen and Dietrich both were physically attractive Caucasian women of approximately the same height (i.e., 5'3"), weight (i.e., 115 lbs.) and hair color (i.e., brown). **App. 41, 42 (Tr. 155-156; 159-160).**

From November 1999 through spring 2000, Respondent developed a scheme intended to hide his relationship with Lennen from his then-wife. Under the scheme, Respondent funneled personal funds to Lennen through his lawyer trust account and through the trust account of a third-party lawyer. **App. 32, 33 (Tr. 120-121; 124).** In this manner, Respondent funneled more than \$100,000 of his personal funds to Lennen. **App. 33 (Tr. 123).** Respondent also bought Lennen a \$56,000 Mercedes-Benz automobile. **App. 33 (Tr. 123).**

During this time period, Lennen accompanied Respondent on several business trips. They shared the same room. Lennen also visited Respondent at his St. Louis law office a couple of times after normal business hours when no one else was present. **App. 26 (Tr. 94-95).** On at least one occasion, Respondent picked Lennen up at the airport

during a lengthy layover while passing through St. Louis on her way to drug treatment and she accompanied him to his law office. **App. 35-36 (Tr. 132-133).** Respondent kept client files in his law office suite.

In June 2000, Respondent's law partner David Zevan discovered irregularities in the use of the law firm's trust account, dissolved the partnership and filed an ethical complaint against Respondent with the Office of Chief Disciplinary Counsel.

Respondent advised Dietrich that she could choose to continue to be represented by Respondent or could choose to be represented by Respondent's former law partner, Zevan. Dietrich chose to continue to be represented by Respondent. **App. 6 (Tr. 16).** Respondent did not advise Dietrich that the dissolution of the law partnership involved his relationship with Amy Lennen.

Respondent claimed that he terminated his intimate relationship with Lennen after the ethical complaint was filed, but he continued to maintain contact with Lennen. Lennen continued to make demands for money from Respondent and threatened Respondent and Respondent's family. Respondent continued to pay money to Lennen. **App. 24, 25, 35 (Tr. 88, 89, 129, 130).**

On November 16, 2000, Respondent filed Dietrich's wrongful death suit in the United States District Court for the Eastern District of Missouri, being Cause No. 200CV0091. **App. 82.** Dietrich was very interested in the progress of the law suit and kept in frequent contact with Respondent. **App. 17-18 (Tr. 60-61).**

In October 2001, Dietrich traveled to New York City with Respondent in order to attend an expert witness deposition in the wrongful death case. Prior to the deposition,

Respondent received several telephone calls from Lennen in which Lennen told Respondent that she was coming to New York because of problems with her drug rehabilitation. Respondent wire transferred money to Lennen from New York. Respondent told Dietrich that if Lennen came to New York, Dietrich would have to leave town. Dietrich realized at this point that Lennen was not Respondent's "half sister."

App. 7-8 (Tr. 19-21).

On or about December 13, 2001, Amy Lennen obtained a California driver's license by using Dietrich's maiden name, Brenda Lou Harrison. **App. 98; 112.**

On or about March 21, 2002, Amy Lennen used Dietrich's identity to take out a loan from Chase Manhattan Automotive Finance Corporation ("Chase") in the principal amount of \$39,874.66 in order to purchase a new 2001 Volkswagen conversion van. The monthly payments on the Chase loan were \$717.77. Lennen forged Dietrich's name (i.e., Brenda Lou Harrison) to the Chase loan documents and to the California vehicle registration documents. **App. 9-10 (Tr. 27-29); App. 99-102; App. 110-120.**

Lennen also used Dietrich's maiden name to fraudulently obtain several credit cards in the name of Brenda Lou Harrison. **App. 9, 28 (Tr. 26, 102).**

On March 27, 2002, Lennen was arrested in Los Angeles County for possession of a controlled substance. When arrested, Lennen identified herself to law enforcement as Brenda Harrison. **App. 92.** Lennen called Respondent from jail in the middle of the night. Later, Lennen's California attorney, David Demergian, called Respondent and told him that he "needed" to come to California to visit Lennen in jail. Respondent had

previously paid Demergian for legal services that Demergian rendered to Lennen. **App. 27 (Tr. 98).**

By Order dated June 14, 2002, this Court suspended Respondent's license to practice law for a period of 150 days and ordered that a monitor be appointed to review Respondent's law firm trust account activity for a period of five (5) years. **App. 55, 64.** Ninety days of the 150 day suspension were for disciplinary reasons as a result of violating Rule 4-1.15 and Rule 4-8.4(d) of the Rules of Professional Conduct in connection with Respondent's funneling of funds to Amy Lennen through his lawyer trust account. The discipline was invoked pursuant to a Stipulation and Agreement between Chief Disciplinary Counsel and Respondent which provided in relevant part as follows:

“Beginning in or about December 1999 and continuing until in or about June 2000, Respondent commingled personal funds with the Tolin & Zevan trust account at First Bank. Such commingled funds were transferred by wire transfer from the Tolin & Zevan trust account through the trust account of a third-party attorney for Respondent's personal expenditures.”

On or about April 14, 2002, attorney Demergian obtained a court order in California allowing Respondent to visit Lennen in jail, as Demergian's agent, and under a cloak of attorney-client privilege. Respondent flew to California and met with Lennen in jail. During this jail visit, Respondent learned from Lennen that she had stolen Dietrich's identity, was arrested using Dietrich's maiden name of Brenda Harrison, and had used Dietrich's identity to finance and purchase a car. **App. 28 (Tr. 101).**

There was never a question in Respondent's mind that Lennen had obtained Dietrich's identity information from Respondent's file. **App. 26 (Tr. 96).**

Dietrich's wrongful death lawsuit, initially set for trial in April 2002, was continued and reset to November 2002 because of Respondent's suspension. Respondent notified Dietrich that the continuance was necessary because of his suspension from the practice of law. Respondent told Dietrich that his suspension involved "the other partner of his law firm." Respondent did not tell Dietrich that the suspension involved his personal relationship with Lennen. **App. 8 (Tr. 23).**

On May 18, 2002, without Dietrich's knowledge or consent, Respondent paid \$717.77 to Chase Bank on the loan fraudulently obtained by Lennen in Dietrich's name. **App. 103-108; App. 9, 10 (Tr. 26, 29, 30 and 31).** Without Dietrich's knowledge or consent, Respondent also paid off a credit card account fraudulently obtained by Lennen in Dietrich's name. **App. 28 (Tr. 102).**

In September 2002, Dietrich learned that her identity had been stolen when she applied for a credit union loan and was informed that she would have to pay a higher interest rate because of several outstanding debts. Dietrich obtained a copy of her credit report which reflected several auto loans and credit loans that she had not made. **App. 9 (Tr. 25-26).** The credit report also reflected a California address even though Dietrich had never lived in California. **App. 9, 11 (Tr. 26, 34).** Dietrich contacted the financial institutions involved and determined that the loans were made using Dietrich's maiden name, Brenda Harrison. Dietrich had not used her maiden name (Harrison) since 1982.

Dietrich received other documents from Chase Bank that reflected a check from Respondent's checking account that had been issued to make a loan payment to Chase Bank. **App. 107; App. 9, 10 (Tr. 26, 29, 30 and 31).** Dietrich's investigation further revealed driver's licenses from three (3) different states had been issued to Lennen in the name of Brenda Harrison as well as credit cards and a bank loan. **App. 9, 11 (Tr. 26, 33, 34, 35 and 36).**

On October 14, 2002, the California police advised Dietrich to discontinue all further contact with Respondent, and accordingly, Dietrich discharged Respondent as her attorney. **App. 9, 12, 18, 19 (Tr. 27, 39, 61 and 66).** Dietrich retained Alvin Wolff, Jr. as successor counsel. Wolff continued the wrongful death case from the November 2002 trial setting "so he could get more familiar with the case." **App. 12 (Tr. 40).**

On October 22, 2002, the Supreme Court reinstated Respondent's license to practice law in the State of Missouri. **App. 55, 64.**

In April 2003, the Dietrich's wrongful death case was tried by Alvin Wolff to a defense verdict against the defendant doctor. Hannibal Regional Hospital settled out of court for \$40,000.00. **App. 13 (Tr. 41).**

On May 13, 2003, Dietrich filed an ethical complaint against Respondent with the Office of Chief Disciplinary Counsel. **App. 71.**

On August 1, 2004, Amy Lennen was tried and convicted of five (5) felony charges related to her theft of Dietrich's identity at a bench trial in Los Angeles County. Brenda Dietrich traveled to California and testified at Lennen's trial. **App. 12 (Tr. 37); App. 109-120.**

III. The Disciplinary Hearing Panel's Decision

On October 28, 2005, the Disciplinary Hearing Panel filed its Findings of Fact, Conclusions of Law and Decision recommending that Respondent be disbarred from the practice of law. **App. 44-54.** The Panel found that Dietrich gave Respondent copies of her driver's license and birth certificate during the course of Respondent's representation of Dietrich in the wrongful death case. These documents were maintained in Dietrich's client file located in Respondent's office. The Panel inferred from the evidence that this personal information was stolen from Dietrich's file by Lennen on one of the occasions when she was alone with Respondent in his law office. **App. 51.** The Panel was persuaded that the theft of Dietrich's identity was not the result of a random perusal of Respondent's files by Lennen, but rather was the result of Lennen's specific targeting of Dietrich's file based on prior information gleaned from Respondent concerning the personal characteristics of Dietrich, who the Panel noted was a Caucasian female of similar age, height, weight and appearance. **App. 51.**

While the evidence did not permit the Panel to find that Respondent provided the personal information to Lennen, the Panel found that the evidence did support an inference that Respondent at the very least was negligent in permitting Lennen (a person then known by Respondent to be addicted to drugs, who had made threats to Respondent against Respondent's family if not given money, and a person with a history of criminal activity), after-hours solitary access to Respondent's law office suite where client files were kept. **App. 51.** The Panel also found that this negligence on the part of Respondent directly and proximately caused serious and significant damage to Dietrich. **App. 51-52.**

The Panel found that Respondent consciously, intentionally and without excuse or justification withheld information from Dietrich regarding the identity theft. **App. 51-52.** The Panel further found that Respondent consciously abetted Lennen's scheme to financially profit from the theft of Dietrich's identity by making a payment on the Chase loan and paying off a cancelled credit card account fraudulently obtained by Lennen using Dietrich's identity. **App. 52.** At no time did Respondent tell Dietrich that personal information had been stolen from her client file and used by Lennen for fraudulent purposes. **App. 52.**

The Panel concluded that Respondent violated Rule 4-1.6(a) of the Missouri Rules of Professional Conduct in negligently allowing Lennen to have access to Brenda Dietrich's file and as a result, confidential personal information of his client was revealed to Amy Lennen for purposes unrelated to the representation. **App. 52.**

The Panel also concluded that Respondent violated Rule 4-8.4(c) of the Missouri Rules of Professional Conduct and engaged in conduct involving dishonesty, fraud, deceit and misrepresentation by making a payment on the Chase Bank loan and the credit card account illegally obtained by Lennen using Dietrich's identity without notifying his client, Brenda Dietrich, that Lennen had stolen Dietrich's identity, that the Chase Bank loan or credit card account existed or that Respondent had made said payments. **App. 52.**

Having found violations of the Rules of Professional Conduct, the Panel applied the provisions of the ABA *Standards for Imposing Lawyer Sanctions (1991 Edition)* to determine the appropriate sanction that should be imposed on Respondent. The Panel found that Section 4.23 of the *ABA Standards* was applicable in that Respondent

negligently revealed information relating to the representation of Dietrich, that such information was not otherwise lawfully permitted to be disclosed and that the disclosure of the information caused serious and significant injury to Dietrich.² The Panel also found that Section 4.61 of the ABA Standards was applicable in that Respondent knowingly deceived Dietrich with the intent to benefit Lennen and thereby caused serious and significant injury to Dietrich.³ **App. 52-53.**

The Panel also considered aggravating and mitigating circumstances as authorized by the ABA Standards in determining what sanction to impose. The Panel specifically found that the following aggravating circumstances were applicable in this case:

- A history of prior disciplinary offenses [Section 9.22(a)];
- Dishonest motive [Section 9.22(b)];
- Refusal to acknowledge wrongful nature of the conduct [Section 9.22(g)].

Based on the foregoing findings and conclusions, the Disciplinary Hearing Panel recommended that Respondent be disbarred from the practice of law in the State of

² Section 4.23 of the ABA Standards states as follows: “Reprimand is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client.”

³ Section 4.61 of the ABA Standards states as follows: “Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potentially serious injury to a client.”

Missouri. **App. 52-54.** The Respondent did not concur in the Panel recommendation, causing the record to be filed with the Court.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT TOLIN FOR VIOLATIONS OF RULES 4-1.6(a) AND 4-8.4(c) BECAUSE HE REVEALED CONFIDENTIAL CLIENT INFORMATION TO A THIRD PARTY AND BECAUSE HE ENGAGED IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT AND MISREPRESENTATION BY MAKING A PAYMENT ON A LOAN FRAUDULENTLY OBTAINED BY A THIRD PARTY IN THE NAME OF HIS CLIENT WITHOUT NOTIFYING HIS CLIENT THAT THE LOAN EXISTED OR THAT HE HAD MADE SAID PAYMENT.

Rule 4-1.6(a)

Rule 4-8.4(c)

In re Oliver, 285 S.W.2d 648 (Mo. banc 1956)

II.

DISBARMENT IS THE APPROPRIATE SANCTION IN THIS CASE WHERE RESPONDENT TOLIN NEGLIGENTLY DISCLOSED CONFIDENTIAL CLIENT INFORMATION AND KNOWINGLY DECEIVED HIS CLIENT WITH THE INTENT TO BENEFIT HIMSELF AND A THIRD PARTY BECAUSE:

- A. THE DISCIPLINARY HEARING PANEL RECOMMENDS DISBARMENT;**
- B. THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGEST DISBARMENT AS THE APPROPRIATE SANCTION; AND**
- C. THE COURT HAS RULED THAT ATTORNEYS WHO ENGAGE IN DECEITFUL AND FRAUDULENT CONDUCT AND THEREBY INJURE THE INTERESTS OF THEIR CLIENT SHOULD BE DISBARRED.**

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

In re Frank, 885 S.W.2d 328 (Mo. banc 1994)

In re Williams, 711 S.W.2d 518 (Mo. banc 1986)

In re Oliver, 285 S.W.2d 648 (Mo. banc 1956)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT TOLIN FOR VIOLATIONS OF RULES 4-1.6(a) AND 4-8.4(c) BECAUSE HE REVEALED CONFIDENTIAL CLIENT INFORMATION TO A THIRD PARTY AND BECAUSE HE ENGAGED IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT AND MISREPRESENTATION BY MAKING A PAYMENT ON A LOAN FRAUDULENTLY OBTAINED BY A THIRD PARTY IN THE NAME OF HIS CLIENT WITHOUT NOTIFYING HIS CLIENT THAT THE LOAN EXISTED OR THAT HE HAD MADE SAID PAYMENT.

The Rule 4-1.6(a) Violation. The Rules of Professional Conduct provide that it is professional misconduct for a lawyer to reveal confidential information relating to the representation of a client. *Rule 4-1.6(a)*. The Comment to Rule 4-1.6(a) notes that a fundamental principle in the client-lawyer relationship is that the lawyer maintain the confidentiality of information related to the representation in order to encourage full and frank communications. The observance of this important ethical obligation not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

The Court has recognized that a lawyer owes his client the utmost good-faith and the highest loyalty and devotion to his client's interests. "The relation between attorney and client is highly fiduciary and of a very delicate, exacting and confidential character,

requiring a very high degree of fidelity and good faith” on the part of the attorney. *In re Oliver*, 285 S.W.2d 648, 655 (Mo. banc 1956). Respondent breached that duty in this case.

Dietrich gave Respondent copies of her driver’s license and birth certificate during the course of Respondent’s representation of Dietrich in the wrongful death case. These documents were maintained in Dietrich’s client file in Respondent’s law office and were ultimately taken and used by Lennen to steal Dietrich’s identity. That Lennen obtained Dietrich’s personal information from Respondent’s client file is indisputable. Dietrich did not know and had never had any contact with Lennen prior to Respondent’s representation. Respondent acknowledged and the Panel found that the only way that Lennen could have obtained Dietrich’s personal information was by accessing Dietrich’s client file maintained by Respondent. **App. 25, 34 (Tr. 90, 126).**

Respondent violated Rule 4-1.6(a) by permitting Amy Lennen, a person Respondent knew to be a drug addict who had a criminal record and who had previously made threats against Respondent and Respondent’s family, to have access to Respondent’s files. This unauthorized disclosure of confidential client information to a third person for purposes unrelated to the representation had a devastating effect on Brenda Dietrich both personally and upon the subsequent prosecution of her wrongful death lawsuit, to wit:

- Dietrich’s credit history, which had previously been excellent, was ruined because Lennen fraudulently obtained and defaulted on several loans using the personal

documents obtained from Respondent's file. Dietrich was denied credit on several occasions and eventually stopped applying for credit. **App. 16 (Tr. 53).**

- After Lennen was arrested on drug charges in California and identified herself as Brenda Harrison (Dietrich's maiden name), Dietrich was required to take extraordinary steps to clear her name, including providing fingerprint samples to California law enforcement officers and making multiple trips to California to attend Lennen's trial and subsequent sentencing. **App. 12 (Tr. 37-38).** To this day, Dietrich is required to carry a declaration from the Long Beach Police Department stating that she is not the person arrested on drug charges in California. **App. 12 (Tr. 38-39).**
- The California police advised Dietrich that she should not have any further contact with Respondent. **App. 18, 19 (Tr. 61, 66).** As a result, Dietrich discharged Respondent as her attorney in her wrongful death case and retained the services of another attorney. **App. 9, 12 (Tr. 27, 39).** The wrongful death case was continued for several months in order to permit new counsel to become familiar with the case and was ultimately tried to a defense verdict. **App. 12 (Tr. 40).**

While Informant's evidence did not permit the Disciplinary Hearing Panel to find that Respondent intentionally provided Dietrich's personal information to Lennen, the Panel did find that Respondent was negligent in permitting Lennen to have solitary access to Respondent's law office where his client files were kept. The Panel also found that the theft of Dietrich's identity was not the result of a random perusal of Respondent's client files by Lennen, but rather was the result of Lennen's specific targeting of

Dietrich's client file based on prior information gleaned from Respondent concerning the personal characteristics of Dietrich. Such conduct constituted a violation of Rule 4-1.6(a) of the Rules of Professional Conduct.

The Rule 8.4(c) Violation. While the disclosure of confidential client information from Dietrich's file may have resulted from negligence on the part of Respondent, his concealment of that disclosure from Dietrich and his active participation in Lennen's scheme constitutes serious intentional misconduct under the Rules of Professional Conduct. The evidence clearly established and the Disciplinary Hearing Panel found the following:

- Once Respondent learned that Lennen had stolen Dietrich's personal papers and identity, he consciously, intentionally and without excuse or justification withheld information from Dietrich regarding such conduct.
- Respondent consciously abetted Lennen's illegal scheme to financially profit from the theft of Dietrich's identity by making a payment on the Chase loan and paying off a cancelled credit card account fraudulently obtained by Lennen using Dietrich's identity.
- At no time did Respondent tell Dietrich that personal information had been stolen from her client file and used by Lennen for fraudulent purposes.

While negligence can happen to otherwise capable and competent lawyers, it is a different matter altogether for Respondent to have knowingly and actively withheld information from his client; information that Dietrich might have been able to use in order to preserve her rights or mitigate further damage to her credit. In addition,

Respondent's misconduct is further exacerbated by his active participation in Lennen's scheme through the payments on at least two of the fraudulent loans obtained in the name of Dietrich. This conduct clearly violated Rule 4-8.4(c) which prohibits a lawyer from engaging in conduct that involves dishonesty, fraud, deceit or misrepresentation.

Respondent first learned of Lennen's theft of Dietrich's personal information and her illegal conduct in obtaining loans in the name of Dietrich when he visited Lennen in a California jail in April 2002⁴ at the behest of Lennen's California counsel, David Demergian. **App. 27 (Tr. 97-98).**⁵ After learning the scope of Lennen's illegal activity and the fact that it directly and severely impacted one of his own clients, Respondent concealed this information from his client, Brenda Dietrich. In justifying his conduct, Respondent testified as follows:

- Respondent felt an obligation to tell Dietrich what had happened, but did not do so because Demergian "told me that I was acting as his agent [in visiting Lennen in jail] and I could not disclose it or I would be violating attorney-client privilege." **App. 36 (Tr. 135).** Respondent, however, admitted that he had no attorney-client relationship with either Lennen or Demergian and that his only attorney-client relationship was with Brenda Dietrich. **App. 36 (Tr. 135-136).**

⁴ Respondent's law license was under suspension at this time.

⁵ Respondent knew that Demergian was Lennen's attorney in California and had previously paid some of Demergian's legal fees owed by Lennen as a result of legal services performed by Demergian on Lennen's behalf. **App. 27 (Tr. 98).**

- Respondent felt that he was clearing up Brenda Dietrich's "problem" by paying \$2,200 on the credit card account fraudulently obtained by Lennen in Dietrich's name and by making a payment on the car loan fraudulently obtained by Lennen using Dietrich's name. **App. 38 (Tr. 142).** "I believe that I had an obligation to Ms. Dietrich. And I was under the impression that by paying everything off, that the problem had been resolved." **App. 36 (Tr. 136).** Respondent, however, continued to withhold the specifics of Lennen's conduct from his client.
- Respondent did not know whether he had an obligation to follow the Rules of Professional Conduct vis-à-vis the disclosure of Lennen's conduct to Brenda Dietrich in April 2002, when his law license was under suspension. **App. 38-39 (Tr. 143-145).**

Informant respectfully submits that Respondent's explanation of his acts and omissions to the Disciplinary Hearing Panel is not worthy of belief and should be ignored as not credible. Instead, Informant believes that Respondent's conduct should be examined by this Court in the context of his lengthy, intimate relationship with Lennen. The relevant facts of that relationship are as follows:

- Respondent was introduced to Lennen by a "dancer" at a Las Vegas "club." **App. 33 (Tr. 122).** Although Respondent was married with two children, he became deeply infatuated and intimately involved with Lennen. **App. 33 (Tr. 122-123).**
- Respondent lavished Lennen with gifts and cash, including a \$56,000 Mercedes Benz automobile. **App. 33 (Tr. 122-123).**

- In order to hide his affair from his then wife, Respondent developed a scheme whereby he would funnel personal funds to Lennen through his attorney trust account. Respondent sent in excess of \$100,000 to Lennen in this manner. **App. 32-33 (Tr. 120-124).** This improper use of his trust account to funnel money to Lennen ultimately resulted in the 2002 suspension of Respondent's license.⁶
- According to Respondent, Lennen continued to demand money from Respondent after he ended the affair by making threats directed at Respondent and his family. Respondent continued to send Lennen money as a result of these threats. **App. 25, 35 (Tr. 89-90, 130-131).**
- Respondent knew that Lennen had a "drug problem" and, in fact, paid for her drug rehabilitation treatment. **App. 33 (Tr. 123).**
- Respondent lied to Dietrich regarding the nature of his relationship with Lennen, explaining to Dietrich that Lennen was his "half-sister." **App. 33 (Tr. 123).**

Informant submits that Respondent's conduct (i) in failing to disclose to his client Brenda Dietrich that Lennen had stolen Dietrich's confidential information from Dietrich's client file, and (2) in trying to take care of Dietrich's "problem" by making payments on the car loan and credit card fraudulently obtained by Lennen using Dietrich's identity, was

⁶ Respondent refused to acknowledge to the Disciplinary Hearing Panel in this case that he knowingly used his trust account to funnel money to Lennen, even though he admitted that he had developed the "scheme" in order to keep his conduct hidden from his then wife. **App. 33-34 (Tr. 121, 124-126).**

simply a natural extension of his relationship with and deep infatuation for Lennen.

Respondent's attempts to explain his actions while simultaneously denying any violation of the Rules of Professional Conduct are simply not worthy of belief.

Respondent violated Rule 4-1.6(a) of the Rules of Professional Conduct by revealing the confidential client information of Brenda Dietrich to his paramour, Amy Lennen. Respondent then violated Rule 4-8.4(c) of the Rules of Professional Conduct by engaging in conduct involving dishonesty, fraud, deceit and misrepresentation by making payments on loans fraudulently obtained by Lennen in the name of his client, Brenda Dietrich, without notifying Dietrich that the loans existed or that he had made said payments.

II.

DISBARMENT IS THE APPROPRIATE SANCTION IN THIS CASE WHERE RESPONDENT TOLIN NEGLIGENTLY DISCLOSED CONFIDENTIAL CLIENT INFORMATION AND KNOWINGLY DECEIVED HIS CLIENT WITH THE INTENT TO BENEFIT HIMSELF AND A THIRD PARTY BECAUSE:

- A. THE DISCIPLINARY HEARING PANEL RECOMMENDS DISBARMENT;**
- B. THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGEST DISBARMENT AS THE APPROPRIATE SANCTION; AND**
- C. THE COURT HAS RULED THAT ATTORNEYS WHO ENGAGE IN DECEITFUL AND FRAUDULENT CONDUCT AND THEREBY INJURE THE INTERESTS OF THEIR CLIENT SHOULD BE DISBARRED.**

The Disciplinary Hearing Panel recommended that Respondent be disbarred from the practice of law based on violations of Rules 4-1.6(a) and 4.8.4(c) of the Rules of Professional Conduct. While the evidence did not permit the Panel to find that Respondent provided personal client information to Lennen, the Panel found that the evidence did support an inference that Respondent at the very least was negligent in permitting Lennen (a person then known by Respondent to be addicted to drugs, who had made threats to Respondent against Respondent's family if not given money, and a person with a history of criminal activity), after-hours solitary access to Respondent's law office suite where client files were kept. The Panel also found that this negligence on

the part of Respondent directly and proximately caused serious and significant damage to Dietrich.

The Panel found that Respondent consciously, intentionally and without excuse or justification withheld information from Dietrich regarding the identity theft. The Panel further found that Respondent consciously abetted Lennen's scheme to financially profit from the theft of Dietrich's identity by making a payment on the Chase loan and by paying off a cancelled credit card account fraudulently obtained by Lennen using Dietrich's identity. At no time did Respondent tell Dietrich that personal information had been stolen from her client file and used by Lennen for fraudulent purposes. In addition, Respondent had ample time from April 2002 (when he learned of the theft from Lennen) until September 2002 (when Brenda Dietrich, Respondent's client, learned of the theft) to fully rectify the situation. The Panel found that this conduct warranted Respondent's disbarment.

This Court has relied on the *ABA's Standards for Imposing Lawyer Sanctions (1991 Edition)* to determine the appropriate discipline to be imposed in attorney discipline cases. *In re Warren*, 888 S.W.2d 334 (Mo. banc 1994); *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994); *In re Oberhellman*, 873 S.W.2d 851 (Mo. banc 1994).

The following ABA standards are applicable:

3.0 Generally

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

- (a) the duty involved;

- (b) the lawyer's mental state;
- (c) the actual or potential injury caused by the lawyer's misconduct; and
- (d) the existence of aggravating or mitigating circumstances.

4.2 *Failure to Preserve the Client's Confidences*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property.

4.23 Reprimand is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client.

4.6 *Lack of Candor*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client:

4.61 Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client.

9.2 *Aggravation*

9.21 *Definition.* Aggravation or aggravating circumstances are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.

9.22 *Factors which may be considered in aggravation.* Aggravating factors include:

- (a) prior disciplinary offenses;
- (b) dishonest or selfish motive;
- (c) a pattern of misconduct;
- (d) multiple offenses; and
-
- (g) refusal to acknowledge wrongful nature of conduct.

The ABA standards support disbarment in this case because Respondent revealed client confidences and then engaged in fraudulent and deceitful conduct toward his client. The resulting injury to Respondent’s client, Brenda Dietrich, was significant and devastating, to wit:

- Dietrich’s credit history, which had previously been excellent, was ruined because Lennen fraudulently obtained and defaulted on several loans using the personal document’s obtained from Respondent’s law firm file. Dietrich was denied credit on several occasions and eventually stopped applying for credit. **App. 16 (Tr. 53).**
- After Lennen was arrested on drug charges in California and identified herself as Brenda Harrison (Dietrich’s maiden name), Dietrich was required to take extraordinary steps to clear her name, including providing fingerprint samples to California law enforcement officers and making multiple trips to California to attend Lennen’s trial and subsequent sentencing. **App. 12 (Tr. 37-38).** To this

day, Dietrich is required to carry a declaration from the Long Beach Police Department stating that she is not the person arrested on drug charges in California. **App. 12 (Tr. 38-39).**

- The California police advised Dietrich that she should not have any further contact with Respondent. **App. 18, 19 (Tr. 61, 66).** As a result, Dietrich discharged Respondent as her attorney in her wrongful death case and retained the services of another attorney. **App. 9, 12 (Tr. 27, 39).** The wrongful death case was continued for several months in order to permit new counsel to become familiar with the case and was ultimately tried to a defense verdict. **App. 12 (Tr. 40).**

In addition, aggravating circumstances are present. Respondent has previously been suspended by this Court as a result of prior conduct involving Amy Lennen and Respondent's trust account. *ABA Standard 9.22(a)*. Respondent had dishonest motives as reflected in the fact that he consciously abetted Lennen's illegal scheme and concealed Lennen's illegal conduct from his client. *ABA Standard 9.22(b)*. Finally, Respondent refused to acknowledge the wrongful nature of his conduct in his testimony before the Disciplinary Hearing Panel. *ABA Standard 9.22(g)*.

Respondent's testimony to the Disciplinary Hearing Panel regarding his conduct warrants particular scrutiny. While Respondent apologized to Brenda Dietrich for the harm done to her credit as a result of Amy Lennen's conduct [**App. 32 (Tr. 118)**], he refused to acknowledge that his own conduct constituted a violation of the Rules of Professional Conduct. For example, regarding his disclosure of confidential client information to Lennen, Respondent testified as follows:

Q: And to the extent that she accessed your files in your hotel room, hypothetically, while you were at a deposition, and those files were available for her to go through, it is – do you believe that that was in compliance with the standards set out in the Rules of Professional Conduct?

A: Well, I don't think my relationship was professional, so I don't think any of it was professional, in answer to your question. I don't know. I really don't know how to answer that.

Q: Well, she obtained information – confidential information about one of your clients from your files?

A: That's –

Q: At least that's what we think she did.

A: That's what we're assuming.

Q: It's a pretty fair assumption, unless you gave it to her, correct?

A: Right, that's what happened.

Q: And to the extent that happened, are you willing to admit that was a violation of the Rules of Professional Conduct to this Panel?

A: I mean, I haven't read – I haven't read the rules. I mean, if it is, it is. **App. 34 (Tr. 128).**

Respondent also denied ethical responsibility for withholding information from his client after he learned that Lennen had stolen Dietrich's identity and obtained several fraudulent loans in Dietrich's name. Thus, when asked whether he acknowledged an ethical obligation to tell his client, Brenda Dietrich, about the identity theft and fraudulent

loans, Respondent testified “I don’t think I acknowledged that. I think what I said was I wanted to [tell his client], and I was given advice that I could not. I didn’t.” **App. 36 (Tr. 136)**. Respondent also testified that “I believe I had an obligation to Ms. Dietrich. And I was under the impression that by paying everything off, that the problem had been resolved.” **App. 36 (Tr. 136)**. Clearly, Respondent failed to acknowledge the wrongful nature of his conduct within the meaning of the *ABA Standards*.

This Court’s disciplinary decisions likewise support disbarment in this case. It is well settled that the nature of a lawyer’s profession necessitates the utmost good faith and the highest loyalty and devotion to his client’s interests. The relationship between attorney and client is “highly fiduciary” and of a “very delicate, exacting and confidential character, requiring a very high degree of fidelity and good faith on attorney’s part.” *In re Oliver*, 285 S.W.2d 648, 655 (Mo. banc 1956). The Court has imposed severe discipline where the attorney has breached that fiduciary relationship and engaged in conduct involving dishonesty and misrepresentation. *In re Carey & Danis*, 89 S.W.3d 477, 502 (Mo. banc 2002); *In re Cupples*, 979 S.W.2d 932, 936 (Mo. banc 1998).

Any attempt by Respondent to avoid discipline based on an assertion that he was unaware of Lennen’s theft of his Dietrich’s confidential information from his client file must fail. Aside from his failure to hold inviolate the confidential information provided to him as a result of the existence of the attorney-client relationship, Respondent knowingly and intentionally refused to take necessary and appropriate steps to correct the misconduct in the months after he learned of Lennen’s theft and knew the full extent of

the damage done to his client as a result thereof. Such willful conduct was deceitful, dishonest and fraudulent in violation of Rule 4-8.4(c).

Disbarment is appropriate in those cases involving gross misconduct where the attorney has demonstrated that he is unfit to practice law. *In re Frank*, 885 S.W.2d 328 (Mo. banc 1994). The following timeline of Respondent's conduct in this case clearly meets the standard for disbarment set forth in the *Frank* case:

- In April 2002, Respondent learned that his client's personal information had been stolen from his own law firm file by his paramour and that his paramour had fraudulently obtained driver's licenses, an auto loan and credit cards in his client's name and had been arrested on drug charges using the name of his client.
- In May 2002, Respondent makes payments on the auto loan and credit cards illegally and fraudulently obtained by his paramour.
- In June 2002, the Court suspends Respondent for misconduct in the use of his trust account arising from his relationship with his paramour. The suspension is made retroactive to April 2002.
- In September 2002, Respondent's client, Brenda Dietrich, learns of the identity theft from sources other than Respondent. In fact, Respondent never notifies Dietrich of the identity theft and illegal conduct.

A lawyer who puts his loyalty to his paramour ahead of the fiduciary loyalty owed to his client is demonstrably unfit to practice law. This is particularly true when the relationship between Respondent and his paramour has already resulted in a suspension of Respondent's law license.

In *In re Williams*, 711 S.W.2d 518 (Mo. banc 1986), the Court disbarred an attorney who failed to make a timely, accurate and adequate accounting of funds to a client from his trust account. The attorney admitted the violation but sought dismissal of the charges based on his assertion that he was unaware of problems with his trust account and that his misconduct was thus unintentional. The Court rejected this argument, noting that ignorance is not a mitigating factor where the attorney knowingly and intentionally ignored the ongoing problems with his trust account. The attorney's failure to correct those problems combined with the misappropriation of client funds from the trust account warranted disbarment. *In re Williams*, 711 S.W.2d at 522.

Respondent's misconduct in this case is more serious than that involved in the *Williams* case. Once Respondent learned that Lennen had stolen confidential information from Brenda Dietrich's client file and became aware of the severe damage done to his client as a result thereof, Respondent had an affirmative duty to advise Dietrich of the theft so that she could take necessary and appropriate steps to protect herself. The "highly fiduciary" and "delicate, exacting and confidential" nature of the attorney-client relationship demanded that Respondent make full disclosure to Dietrich once he became aware of the identity theft. Respondent's failure to mitigate the damages to his client by making such a disclosure constituted misconduct.

Beyond that, however, Respondent exacerbated the misconduct by failing to disclose the identity theft to his client and by knowingly and intentionally furthering the illegal scheme by subsequently making payments on the auto loan and credit cards fraudulently obtained by Lennen as a result of the identity theft. Respondent's assertion

that he made those payments in order to “protect Ms. Dietrich” **App. 28 (Tr. 102)** is simply not worthy of belief. Given the course of his prior relationship with Lennen, it is more factually accurate to say that Respondent had forsaken the attorney-client relationship in favor of protecting himself, his law license and his paramour (i.e., Lennen).

The most fundamental duty which a lawyer owes to the public is the duty to maintain the standards of personal integrity upon which the community relies. The public expects the lawyer to be honest and to abide by the law; public confidence in the integrity of officers of the court is undermined when a lawyer engages in illegal conduct, such as misrepresentation or other conduct that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer. See Introduction, Rule 5.0, *ABA Standards for Imposing Lawyer Sanctions* (1991 ed.).

To preserve the integrity of the legal profession means, in part, to make decisions that allow the public a sense of confidence in the administration of justice, including a sense of confidence in those who are officers of the court. *In re McBride*, 938 S.W.2d 905, 910 (Mo. banc 1997) (Covington concurrence). The specific fraudulent conduct of Respondent is such that he can no longer be allowed to represent clients and to have reposed in him the trust and confidence necessary to the proper representation of a client by a lawyer. *In re Panek*, 585 S.W.2d 477, 479 (Mo. banc 1979). Disbarment is warranted in this case.

CONCLUSION

Respondent committed professional misconduct (i) by negligently allowing Amy Lennen to have access to Brenda Dietrich's client file, with the result that confidential personal information of his client was revealed to a third party for purposes unrelated to the representation, (ii) by failing to notify his client of the theft of her identity after learning of Lennen's scheme, and (iii) by actively furthering Lennen's scheme by making payments on loans fraudulently obtained by Lennen without notifying Dietrich that he had made such payments. Respondent's conduct violated Rules 4-1.6(a) and 4-8.4(c) of the Rules of Professional Conduct. The presence of prior serious discipline, the significant presence of cognitive awareness in his misconduct and his refusal to take responsibility for, or even acknowledge, the nature and extent of his wrongdoing require disbarment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 2006, two copies of Informant's Brief and a disk containing the Brief in Word format have been sent via First Class United States Mail, postage prepaid, to:

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CERTIFICATION: RULE 84.06(c)

I hereby certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 7,739 words, according to Microsoft Word, which is the word processing system used to prepare this Brief; and
4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus-free.

Alan D. Pratzel

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